No. 16323

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUGUSTINA SEIJO, as Executrix of the Estate of Juan Seijo, Deceased,

Appellant,

vs.

DONALD L. HOBBS, et al.,

Appellees

Appeal From the United States District Court for the Southern District of California Southern Division

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BRIEF OF APPELLEES

JOHN GERALD DRISCOLL, JR.
1123 Bank of America Building
San Diego 1, California

Proctor for Appellees

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Page

CASES

TABLE OF AUTHORITIES CITED (Continued)

Page

CASES

TABLE OF AUTHORITIES CITED (Continued)

TABLE OF AUTHORITIES CITED (Continued)

TABLE OF AUTHORITIES CITED (Continued)

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AUGUSTINA SEIJO, as Executrix of the Estate of Juan Seijo, Deceased,

Appellant,

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DONALD L. HOBBS; JOSEPH N. POMBO; JOSEPH MARCHANT; GILBERT D. MARCHANT; MANUEL G. MARCHANT; HARRY S. GARCIA; JUAN FARINHA; FRANCISCO S. JARDIM; CARMEN SEIJO; MARIA TEIXEIRA; MANUEL JOSEPH FERNANDES; MARGARET MADRUGA; MANUEL P. AMARAL; AUGUST R. LUIS, JR.; and MARIANA F. LUIS,

Appellees.

BRIEF OF APPELLEES

I

STATEMENT OF THE FACTS

Appellant's statement of the facts is incomplete and requires amplification. It might be inferred therefrom that Juan Seijo died before any determination of the merits of this case. This is not so. The fact of the matter is that prior to the death of Juan Seijo substantially all of the issues had been determined and the Trial Court had already made and entered its Interlocutory Decree Establishing Validity, Priority and Amounts of Claims, Foreclosing Preferred Ship's Mortgage and Award of Attorney's Fees. The significance of this decree will be referred to later in this brief.

It may assist this Court in its determination of this appeal if a brief review of the proceedings is here set out.

The action was instituted by Security-First National Bank of Los Angeles by a libel against the Oil Screw SUN KING and against seventeen individual respondents, one of whom was Juan Seijo, and all of whom were co-owners of the vessel. The libel sought to foreclose a preferred mortgage on the vessel, securing a promissory note which the vessel owners either executed or agreed to pay (Trans. pp. 3 to 15).

Three intervening libels to enforce maritime liens against said vessel, and for judgment against its owners, were filed by J. T. Siler, Star-Kist Foods, Inc. and San Diego Marine Construction Company. Raytheon Manufacturing Company also filed an intervening libel to establish its title to a fathometer which

been installed on said vessel.

Hearings were had on February 25, 1957 and on April 22, 1957. At these hearings all parties appeared by counsel. As a result thereof, on May 3, 1957, the Trial Court entered its interlocutory decree, which is set out in full at pages 14 to 23 of the record. An inspection of this decree will demonstrate that all of the issues before the Court (with one exception, hereinafter noted) were finally disposed of. The exact amount due from respondents to libelant and each of the three intervenors was fixed, together with the amount due by way of interest and court costs. The amount of the attorneys' fees due under the terms of said promissory note was fixed and awarded. Title to the fathometer was reserved to Raytheon Manufacturing Company. It was provided that if the net proceeds of the sale of the vessel was insufficient to satisfy the amount awarded to libelant on account of principal, interest and attorneys' fees, that a joint and several judgment for the deficiency should be entered against all of the individual respondents. Only one question was left open for further determination. That was the question of whether the deficiency decree in favor of the three intervenors and against the individual respondents should be joint or joint and several. This portion of the decree is set out in the transcript at page 23 and reads as follows:

> " * * that if the net proceeds of the sale of said O. S. Sun King, her engines, etc., are insufficient to pay the amounts awarded intervening libelants herein, to wit: San Diego Marine Construction Co., J. T. Siler, and Star-Kist Foods,

Inc., a decree in personam may be entered on behalf of said intervenors for such deficiency against respondents, the court reserving at this time its decision as to whether the same shall be against respondents, insofar as the intervening libels only are concerned, jointly or jointly and severally." (Emphasis added)

The vessel was sold at marshal's sale on the afternoon of May 3, 1957, for $26,500.00. Objections to an order confirming sale were filed by the individual respondents on May 10, 1957 (Trans. p. 24) and thereafter overruled on May 17, 1957. Proposed Findings of Fact, Conclusions of Law and Final Decree were prepared by proctors for libelant and lodged with the Clerk on May 23, 1957, and on the following day objections thereto were filed by the individual respondents. The objections appear in the transcript at page 26 and were entirely directed to the portions of the proposed findings and decree, which purported to establish the liability of the respondents to the three intervenors as joint and several rather than joint.

On the same day the Trial Judge entered a Minute Order, reading as follows:

"IT IS ORDERED that money deposited in Registry of Court be paid by the Clerk to the Libelant, Security First National Bank.

"IT IS FURTHER ORDERED that cause is set for hearing for settling of findings, etc. for Aug. 5, 1957, at 10 a.m.

"IT IS FURTHER ORDERED that Attorney Driscoll try to secure stipulation as to factual liabilities as to each intervening libelant as to who incurred debt and what capacity, and if that done said Stipulation be on file by August 5, 1957.

"IT IS FURTHER ORDERED briefs may be filed particularly by Attorney Driscoll and intervening libelants on question of Joint and Several liability."

On June 23, 1957, Juan Seijo died, and on July 25, 1957, Augustina Seijo was appointed executrix of his estate and Letters Testamentary issued by the Superior Court of Santa Clara County.

On August 5, 1957, a hearing was had on the respondents' objections to the Findings of Fact, Conclusions of Law and Final Decree and the matter continued to September 16, 1957.

It will be remembered in this connection that the Interlocutory Decree fixed the liability of respondents to the three intervenors as follows:

To San Diego Marine Construction Company.....	$6,699.37
To J. T. Siler	5,530.50
To Star-Kist Foods, Inc.....	7,442.72

Negotiations between proctors for respondents and the three intervenors then resulted in a compromise wherein and whereby the amounts due the three

intervenors were reduced as follows:

To San Diego Marine Construction Company	$3,684.65
To J. T. Siler	3,492.50
To Star-Kist Foods, Inc.	4,093.50

Thereafter, on September 26, 1957, the Final Decree was entered (Tr. p. 31).

It will be noted that insofar as the libelant Security-First National Bank of Los Angeles was concerned, the Final Decree added nothing to what had theretofore been established and adjudged by the Interlocutory Decree. It will also be noted that, insofar as the three intervenors were concerned, the Final Decree reduced the liability of the respondents from a total of $19,672.59 to a total of $11,270.65, but established that liability to be joint and several.

In the month of September, 1957, each of the three intervenors executed written assignments of their judgment claims to Roger S. Woolley. In October, 1957, Roger S. Woolley duly presented his Creditor's Claim, based on said judgment, to appellant as Executrix of the Estate of Juan Seijo, deceased.

In December, 1957, libelant, Security-First National Bank of Los Angeles, duly presented its claim for the amount due under the decree to appellant, as Executrix of the Estate of Juan Seijo, deceased.

In March, 1958, appellant, by notice in writing, rejected the Creditors' Claims of both Roger S. Woolley and libelant.

In June, 1958, libelant assigned its claims under said decree to Alva Hammel.

In June, 1958, respondents, other than Juan Seijo, filed their notice of motion for substitution of defendant and amendment of judgment, which was served upon appellant. Consents to the granting of said motion by Roger S. Woolley and Alva Hammell were duly filed. At the time set for hearing of said motion, counsel were directed to file briefs, which were thereafter filed. On November 6, 1958, the order appealed from was duly entered by Judge Carter.

II

THE POWER OF A TRIAL COURT TO SUBSTITUTE PARTIES AND AMEND DECREES IS NOT OPEN TO QUESTION

Rule 104 of the Admiralty Rules of the United States District Court, Southern District of California, provides, in part, as follows:

> "Whenever, from the death of any of the parties, or changes of interest in the suit, or defect in the pleadings or proceedings, or otherwise, new parties to the suit are necessary the persons required to be made parties may be made such either by a petition on their part or by the adverse parties."

The right of the Trial Court to adopt the foregoing rule is expressly conferred by Rule 44 of the Rules of Practice in Admiralty and Maritime Cases promulgated by the Supreme Court. Said Rule is found in Title 28, U.S.C. 109, and reads as follows:

> "In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with the rules."

In 2 Benedict on Admiralty (6th Edition) at page 563, it is said:

> "When either party dies before final decree, the executor or administrator of such deceased party, in case the cause of action survives by law, may prosecute or defend the suit to final decree. The claimant or respondent is required to answer accordingly and the court hears and determines the cause and renders its decree for or against the executor or administrator, as the case may require. If the executor or administrator neglect or refuse to appear and make himself a party, the court may issue process requiring him to show cause why the action should not proceed, and if he fail to appear within twenty days after service of such process, the court may render its decree against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party."

At page 564, it is said:

> "In case one of several libelants or respondents dies before final decree, if the cause of action survives to or against the co-libelants or co-respondents, the suit does not abate by such death but a suggestion of the death is made on the record and the suit may proceed in the name of the survivors."

The power of a trial court to order substitution of parties is, of course, not confined to Admiralty cases. Rule 25(a)(1) of the Rules of Civil Procedure (Title 28, U.S.C. 265) provides as follows:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district."

The power to order a substitution of parties is not limited to the Federal Courts, but is expressly conferred by statute in California. Section 385 of the Code of Civil Procedure of this state provides, in part, as follows:

> "An action or proceeding does not abate by the

death, or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest."

Section 669 of the California Code of Civil Procedure provides as follows:

"If a party die before a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate."

The general rule respecting the power of an Admiralty Court to amend its decrees is stated in 3 Benedict on Admiralty (6th Edition), page 193, as follows:

"After the decree is entered, it sometimes appears that by accident, oversight, mistake or misapprehension, the decree is erroneous. In such cases, the court of admiralty possesses the power of correcting or varying the decree, summarily, during the same term, and by proceedings under a libel of review, if the term has gone by. Such a variation, however, should be confined to the correction of an error arising from fraud of the prevailing party or from clerical inadvertence or from the defect of knowledge or information upon a particular point in the case, and the error must be brought to the attention of the court with

the utmost possible diligence."

Although the power to correct a judgment formerly was limited to the term of court in which the judgment was rendered, that limitation no longer exists by virtue of the 1948 amendment to Section 452 of Title 28, U.S. Code, which now provides as follows:

> "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."

III

THE TRIAL COURT'S DISCRETION WAS CORRECTLY EXERCISED

In the recent case of Feener Business Schools Speedwriting Publishing Co. (1st Circuit - 1957), 245 Fed. 2d 609, a subsidiary corporation brought suit in the year 1952 to enjoin the use of a trade mark. Thereafter, the corporation was merged with and absorbed by a parent corporation. This fact was not then known to plaintiff's attorneys. A decree was entered in the name of the subsidiary corporation in July 1954. In 1955 this decree was affirmed by the Circuit Court of Appeals. Contempt proceedings were thereafter taken against defendants and affirmed on appeal in 1956. Thereafter the Supreme Court denied a petition for certiorari. After the filing of the remittitur a motion to substitute the parent corporation as a party plaintiff in lieu of the subsidiary corporation was filed and granted by the trial court in the month of April 1957. The trial court

by its order made the substitution effective nunc pro tunc "as of May 23, 1955, without prejudice to the proceedings heretofore had herein". On appeal from this order the Circuit Court of Appeals said, at page 612:

> "But upon the merits we perceive nothing the matter with the said order. Only the sheerest technicality was involved in the order of substitution, whereby the parent corporation, having absorbed its wholly-owned subsidiary by merger was allowed to be substituted nunc pro tunc for the original nominal plaintiff in this case." (Emphasis added.)

Accordingly, the order was affirmed

It will be noted that in the above case the order of substitution was made three years after the entry of the final decree. There is no difference in substance or principle between the case cited and the case at bar. The substitution of a successor corporation for a defunct subsidiary corporation presents no different problem than the substitution of an executrix for a deceased party.

In the case of Irving Trust Company v. American Silk Mills, Inc., 72 Fed. 2d 288, the Circuit Court of Appeals of the Second Circuit was presented with a case where an action had been instituted by receivers of a corporation in their individual names as such receivers. A judgment in favor of plaintiffs was obtained in the trial court. After the entry of judgment, a motion was made to substitute the corporation as a party plaintiff in lieu of the individual receivers. On appeal

from this order the court held, at page 290:

> "The corporation may be substituted as plaintiff throughout the action, and the judgment, if otherwise valid, may be amended nunc pro tunc so as to stand in the name of Garment Center Capitol, Inc."

This court had occasion to consider the propriety of a comparable order in the case of Barnett v. United States, 82 Fed. 2d 765 (certiorari denied, 57 S. Ct. 9, 299 U.S. 546, 81 L. Ed. 402). In that case Judge Wilbur, speaking for the Court, says, at page 770:

> "Here it may be appropriately added that, before the final decree was filed, Jackson Barnett died, and the Court entered a nunc pro tunc decree as of the date of the announcement of the decision which was in writing and signed by the judge. This was proper." (citing cases)

The learned Trial Judge had occasion to consider the question of substitution of parties in a prior civil suit. See Bertsch v. Canterbury, 18 F.R.D. 23. In that case in personam jurisdiction had not been acquired prior to defendant's death. Here, of course, in personam jurisdiction over Juan Seijo had been acquired prior to his death. The decision of Judge Carter in the case at bar is, therefore, entirely consistent with his ruling in the Bertsch case.

In the case of Milich v. Schlesinger, 156 F. Supp. 658, the Court says, at page 659:

"Defendant's contention that plaintiff would also be barred in this action by reason of Sec. 7-801(c), Burns' Ind. Stat. (1953) Replacement), because no claim was filed with defendant's estate within the six month period provided for by that section, is without merit. The court, in the case of the death of a party pendente lite, retains jurisdiction as if the decedent were still living, and has jurisdiction over proper amendments made after the death and substitution of parties. Clodfelter v. Hulett, 1884, 92 Ind. 426; Lawson v. Newcomb, 1859, 12 Ind. 439. If the decedent dies during the action, the action merely continues against his representative. Sec. 2-403, Burns' Ind. Stat.; Clodfelter v. Hulett, supra; Holland v. Holland, supra; I. L. E. Abatement Sec. 22."

The Indiana statute involved in the above case is comparable to Section 385 of the Code of Civil Procedure. The California cases applying C. C. P. Section 385 and C. C. P. Section 669 reach a similar result.

See: Fox & Hale v. Norcross, 108 Cal. 478, 41 Pac. 328;
Leavitt v. Gibson, 3 Cal. 2d 90, 43 P. 2d 1091;
Norton v. City of Pomona, 5 Cal. 2d 54, 53 P. 2d 952;
Copp v. Rives, 62 C. A. 776, 217 Pac. 813.

In the case at bar the interlocutory decree resolved all issues of fact. That decree was an appealable order (see 28 U. S. C., Sec. 1292(c) and 4 Benedict on Admiralty, 6th Ed. 19). The time for an appeal from

such an order is fifteen days. (See Eggers v. Southern Steamship Co. (C. C. A. 5th), 112 Fed. 2d 347 (certiorari denied) 311 U. S. 680, 85 L. Ed. 438, 61 S. Ct. 49.) Since the order was entered on May 3, 1957, the time for appeal expired before Juan Seijo's death on June 23, 1957. The only question left open, therefore, at Juan Seijo's death was a question of law, namely, whether the liability of the individual respondents to the three intervenors was joint or joint and several. The interest of Juan Seijo in the determination of that question was identical with the interests of the other sixteen individual respondents who were represented by counsel. The determination of that question by compromise embodied in the final decree reducing the potential liability of all respondents from $19,672.59 to $11,270.65 was just as advantageous to Juan Seijo's estate as it was to the other sixteen respondents.

IV

REGARDING THE CALIFORNIA PROBATE CLAIMS STATUTES

Appellant contends that the Probate Claims Statutes of the State of California precluded the Trial Judge from making the order appealed from. Appellant's argument in this connection is set forth in subdivisions IV and V of her brief and covers pages 6 to 23.

Underlying appellant's argument in this connection is, we believe, a basic misconception by appellant of the order appealed from.

At page 6 of her brief, at the inception of her argument in this connection, we find the following statement:

> "As stated above the respondents in this action are, by their motion seeking to establish the liability of the Estate of Juan Seijo for a portion of the deficiency judgment entered and to establish their right of contribution."

This statement simply is not so. The order appealed from speaks for itself and is a complete refutation of this assertion. There is no mention therein of "a portion of the deficiency judgment" or of any "right of contribution". The further assertion that respondents' motion "goes beyond seeking mere substitution of a party in an action and asks, in addition, that the judgment be made fully effective against the Estate" is likewise not so. The motion of respondents, which is set out in the record, speaks for itself and refutes this assertion. All that is asked for in the motion is "an order substituting Augustina Seijo, as Executrix of the Estate of Juan Seijo, deceased, as a respondent * * * and amending the judgment * * * by substituting said Augustina Seijo, as Executrix of the Estate of Juan Seijo, deceased, in the place and stead of Juan Seijo."

The assertion is made by appellant, at page 7 of her brief, that "The judgment as entered by the District Court purports to allow the individual respondents a right of contribution for portions of sums paid by them and would permit collection of a judgment in the name of Alva Hammel, who has not to this date filed a claim". This assertion is unfounded. The judgment does not

"purport to allow the individual respondents any right of contribution. No mention whatever is made therein of any right of contribution by the individual respondents. All that is determined by the judgment as amended is the liability of the respondents, including the Executrix of the Seijo Estate, to the libelant and the three intervenors. It is obviously incorrect to assert that the amended judgment "would permit collection of a judgment in the name of Alva Hammel, who has not to this date filed a claim". The amended judgment is, of course, silent as to Alva Hammel's right of collection. Alva Hammel is not mentioned in the judgment and his rights to collect the same are obviously solely the concern of the Probate Court of the County of Santa Clara, State of California and not the District Court of the United States. In this connection, we direct the Court's attention to Peoples Home Savings Bank vs. Saddler, 1 C. A. 189; 81 Pac. 1029. That case involved a death during an appeal. The court says, at page 194:

> "Upon the death of the defendant the power of that (the Superior) Court to enforce its judgment by execution terminated, and the respondent was remitted for its collection to the probate jurisdiction of the court having charge of the administration of his estate, and to that court the appellant must present any defense there may be to its payment out of the assets of that estate."

The above language is pertinent here. At the time the order appealed from was entered the Trial Judge was concerned solely with the question of whether the Executrix should be substituted as a respondent in the place and stead of the decedent and the judgment theretofore entered amended to reflect such substitution.

He was not concerned with any problems involved in the collection of the amended decree. Should any question thereafter arise respecting the collectability of the judgment, that question would of necessity be resolved by the Probate Court of Santa Clara County.

The further assertion of appellant at page 7 of her brief, that "the failure to file or present claims has barred the entry of a judgment against the Estate * * *" is incomprehensible in the light of the fact that it appears from the Stipulation as to Facts, appearing in the record at pages 42 and 43, that both Roger S. Woolley, as assignee of the judgments in favor of the three intervenors, and the libelant, Security-First National Bank of Los Angeles, did file claims against the Seijo Estate. It further appears from the affidavit of one of the attorneys for appellant (Tr. p. 40) that Notice to Creditors was first published on July 30, 1957, requiring the filing of claims against said estate within six months of that date. The claim of Roger S. Woolley was filed on October 16, 1957, and the claim of libelant was filed on December 10, 1957. Both claims, therefore, were filed within the time prescribed by law.

We are at a complete loss to understand how the appellant can seriously advance the argument that the California Probate Claims Statutes barred the Trial Judge from making the order appealed from when the record on its face shows that the claims statutes were fully complied with.

The cases cited by appellant in this subdivision of her brief are not in point here; however, we shall allude to them briefly. Just v. Chambers, 312 U.S. 383,

85 L. Ed. 903, 61 S. Ct. 687 (1940), did not involve the question of substitution of parties, as incorrectly stated by appellant. The petition for limitation of liability was filed in the first instance by the executor of the estate of the yacht owner, who died five days after the accident. See 113 Fed. 2d 105, at 107.

Wilburn Boat Company v. Firemen's Fund Insurance Company, 348 U.S. 310, 99 L. Ed. 337, 75 S. Ct. 368 (1955), is not in point. That case was concerned with warranties in a policy of marine insurance. The power of an Admiralty Court to order substitution of parties and correct a decree was not even mentioned.

The Miramar (In re Statler), 31 Fed. 2d 767 (S.D. N.Y. 1929), aff'd 36 Fed. 2d 1021 (2d Cir., 1930), certiorari denied, 281 U.S. 752, 74 L. Ed. 1163, 50 S. Ct. 355 (1930), did involve a question of substitution of parties. That case was decided under Section 955 of the Revised Statutes (Title 28 U.S.C.A. 2d 788). That section, of course, was the forerunner of Rule 25(a) of the Federal Rules of Civil Procedure. The sole question presented to the court was whether or not the action survived and the Court held it did not as it was based on tort. In the case at bar, the cause of action is not based on tort but is based upon contract and, under elementary rules survives the death of a party and is not extinguished thereby.

Amoth v. United States, 3 Fed. 2d 848, cited at page 13 of appellant's brief, and Meade v. Luksefjell, 148 F. Supp. 708, cited at page 15, involved tort actions and are, likewise, not in point.

Mann v. Kleisdorff, 16 Fed. 2d 997 (5th Cir. 1927), cited by appellant at page 15 of her brief, involved no question of substitution. The suit in the first instance was brought against the executrix.

The decision of this Court in the case of Certain-Teed Products Corporation vs. Luke, 74 Fed. 2d 384 (9th Cir. 1934), referred to by appellant at page 17, did not touch upon the problem involved in the case at bar. In that case a creditor sued the administrator of the debtor's estate upon a claim. The action was not instituted within the 3-month period prescribed by Arizona law. This Court held that a Federal Court of Equity was without power to relieve a claimant from his failure to comply with the statutory limitation.

The case of Tobin v. Hymers, 99 Fed. 2d 740 (9th Cir. 1938), cited by appellant at page 17 of her brief, likewise involves no question of substitution of parties. In that case a receiver of a National Bank sought to enforce the liability of a deceased stockholder against the sole devisee of his estate. This Court properly held that the Nevada law requiring the presentation of claims within three months after publication of Notice to Creditors precluded recovery.

Suffel v. Bosworth, 95 Fed. 2d 494 (9th Cir. 1938), cited by appellant at page 18 of her brief, involved a situation where, again, the suit was initially brought against a personal representative and affords appellant no solace.

Madruga v. Superior Court, 346 U.S. 556, 98 L. Ed. 290, 74 S. Ct. 298 (1954), cited at page 14 of

appellant's brief, is far afield from the case at bar. That case was concerned with the jurisdiction of a state court to decree partition of a vessel as between co-owners.

The cases involving wrongful death statutes, cited at pages 21 and 22 of appellant's brief, are neither "analogous" or "persuasive", as appellant suggests. On the contrary, they are utterly foreign to the questions here presented and can afford no assistance to this Court in its consideration thereof.

V

THE DECREE WAS NOT VOID

Commencing at page 23 of her brief, appellant advances the argument that the final decree, signed by Judge Carter on September 26, 1957, was void by reason of the prior death of Juan Seijo. The only case cited in support of this argument is Estate of Cazaurang, 35 Cal. App. 2d 556, 558 (1939). Although the Court in that case did state that a court was without jurisdiction to proceed where one of the parties died, it will be noted that that case involved a Writ of Prohibition to restrain the Court from proceeding with a will contest until such time as a personal representative was substituted for the deceased party.

The Cazaurang case did not hold that a judgment obtained after the death of a party was void, and this is not the law of California.

In the case of Machado v. Flores, 75 C. A. 2d 759 (171 P. 2d 440), it is squarely held that a judgment rendered after the death of a party is not void. In that case the Court, after considering the earlier California cases in point, says, at page 762:

> "* * * the California courts are not committed to the position advanced by appellants that the death of a party, ipso facto, renders absolutely void a judgment for or against such party. Such a judgment is, at most, a mere irregularity."

VI

THE ORDER APPEALED FROM WAS NOT BARRED BY LAPSE OF TIME

In subdivision VII of her brief, appellant advances the contention that the motion of appellees was not filed in time. It is first urged that the ten-day limit prescribed by Rule 59(e) of the Federal Rules of Civil Procedure is applicable. It is also contended that Rule 60(b) applies. The answer to this contention is found in the fact that the enabling rule under which the Court acted in this case was Rule 104 of the local rules of the District Court. That rule contains no time limitation.

Rule 25(a) of the Rules of Civil Procedure permits the filing of a motion for substitution of parties "within two years after death".

Rule 59(e) was enacted to cover the special situation in the case of Boaz v. Mutual Life Insurance Co.,

146 Fed. 2d 321, as appears from the notes of the Advisory Committee. That rule does not apply here.

In the case at bar, amendment of the judgment was a necessary corollary of the order substituting the executrix for the decedent as a respondent in this case. In the Feener Business Schools case (supra) the order of substitution was made three years after the entry of the decree. In Southern California Telephone Company v. Damenstein, 81 C. A. 2d 216, an order for substitution was granted thirteen years after the entry of the judgment.

If the Rules of Civil Procedure are applicable to this case, as appellant contends, her argument as to the timeliness of the motion is refuted by the rules themselves as the motion here was filed not only within the two-year period prescribed by Rule 25, but, also, within the one-year period prescribed by Rule 60.

VII

CONCLUSION

In the concluding portion of her brief, appellant alludes to our argument in the Court below wherein we characterized her objections to the order appealed from as involving the "sheerest technicality". We make no apology for this language for it was lifted verbatim from the decision of the Circuit Court of Appeals for the First Circuit in the Feener Business Schools case (supra). Indeed, we venture the suggestion that upon a review of this record this Court also will "perceive

nothing the matter with the said order" and will conclude that on the merits it should be affirmed.

Respectfully submitted,

JOHN GERALD DRISCOLL, JR.
Proctor for Appellees